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Supreme Court, U.S.
FILED
JUL 2 2002
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(3)

No. 01-1755

IN THE SUPREME COURT
OF THE UNITED STATES

JOHN LAMBERT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY

Petitioner,

v.

GARY BENN,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Respondent Gary Benn, through his attorneys Suzanne Lee Elliott and David B. Zuckerman, moves for leave to proceed *in forma pauperis* for the purpose of filing the accompanying response to petition for writ of certiorari. Undersigned counsel was appointed to represent Mr. Benn in the district court and court of appeals under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. Therefore, petitioner is not required to file a declaration in support of this motion. See Supreme Court Rule 39.1.

RESPECTFULLY SUBMITTED this 2nd day of July, 2002

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JOHN LAMBERT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY,

Petitioner,

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Question Presented

As Petitioner concedes, the Ninth Circuit Court of Appeals correctly stated the standard of review set forth in 28 U.S.C. § 2254(d)(1) and *Williams v. Taylor*, 529 U.S. 362 (2000). Should this Court grant certiorari to decide whether the Ninth Circuit correctly applied that standard to the facts off this case?

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Opinions Below

Petitioner Lambert has correctly set out the opinions below.

Jurisdiction

Lambert has correctly invoked this Court's jurisdiction.

Statement

The following statement of facts and procedural history is quoted from the Ninth Circuit's decision. Any inaccuracies are noted in footnotes.

I. FACTUAL BACKGROUND

On February 10, 1988, Gary Michael Benn made a 911 call to the Pierce County Sheriff's Department from the home of his half-brother, Jack Dethlefsen, and reported finding his half-brother's body as well as the body of his half-brother's friend, Michael Nelson. Officer Junge of the Pierce County Sheriff's Department arrived at the scene three minutes later and observed the bodies of the two victims on the floor in the living room. Both men had been shot once in the chest and once in the back of the head. He checked them for vital signs and found none. The bodies were still warm and bleeding, suggesting that both men had been killed recently.

There was a bullet hole in the couch in the living room consistent with someone having been shot while on the couch. There were also bloodstains that matched Dethlefsen's blood type on both the couch itself and on a newspaper that was on it. The medical examiner testified that Dethlefsen was shot in the chest while on the couch because only the chest wound would have allowed him to move around and end up on the floor where the police found him.

There was a .45 caliber handgun on the floor between the two bodies and a baseball bat next to Dethlefsen's body. Dethlefsen's head rested next to a gun cabinet and the glass face of the cabinet, which had a shotgun in it, had been broken. Police found a boot print that matched Benn's boot on a piece of broken glass next to Dethlefsen's elbow. There was also blood on one of Benn's boots with spatter patterns consistent with Benn's having shot Nelson in the head while standing next to his body.

Benn was charged with two counts of premeditated murder with the aggravating circumstance that the murders were part of a common scheme or single act, and was given notice of the government's intention to seek the death penalty. The defense conceded at trial that Benn had shot both Dethlefsen and Nelson, but claimed that the shootings were in self-defense after a spontaneous argument between Benn and Dethlefsen. The prosecution, however, contended that Benn had planned the killings primarily in order to cover up his participation with the victims in an arson-insurance-fraud scheme. At trial, the prosecution relied heavily on various inculpatory statements that Benn had allegedly made to Roy Patrick, a "jailhouse informant" who was in Benn's cell block while Benn was awaiting trial, as well as on highly circumstantial evidence relating to the alleged arson.

A. ADDITIONAL EVIDENCE AT TRIAL

On the day of the shootings, Benn had been at Larry Kilen's barbershop before he went to Dethlefsen's house. While at the barbershop, Benn spoke to Dethlefsen on the phone and Kilen heard him say, "What the hell is going on? I will be right back -- I will be right there. What's the matter? What is that?" Benn told Kilen that Dethlefsen was drunk and wanted him to come over because he had fallen down. Multiple witnesses at trial testified that Dethlefsen was an alcoholic, and his autopsy revealed that he had a blood alcohol content of 0.07 at the time of his death. Similarly, Nelson's autopsy revealed that he had a blood alcohol content of 0.11.

Benn denied that he went to Dethlefsen's house with the intention of harming either Dethlefsen or Nelson. A police search of Benn's car revealed that he had a .22 caliber pistol in the car that he had not taken inside the house with him. Benn did not testify at

the trial and much of his version of the events was presented through statements he made to his brother, Monte Benn ("Monte").

Monte testified that Benn had described the following series of events to him: When Benn went into Dethlefsen's house on the day of the shootings, he found a piece of paper on the kitchen counter with Gail Fisk's phone number on it. Fisk was Benn's ex girlfriend with whom he had been trying to reconcile. Benn thought that Dethlefsen and Nelson were harassing Fisk because he had seen Nelson's car at Fisk's house on occasion. Benn had questioned Dethlefsen about Fisk previously but Dethlefsen had denied harassing her. After Benn discovered the note with Fisk's phone number on it, he took the note into the living room and confronted Dethlefsen. In response, Dethlefsen said, "Well Benny, you got me" and reached for the .45 caliber gun that he routinely kept on his living room coffee table. Benn then grabbed the gun and shot Dethlefsen in self-defense. After being shot, Dethlefsen moved toward the gun cabinet. Nelson then got up and threw a beer can at Benn. Benn remembered shooting Nelson, but did not remember much else.

Monte testified that he got the impression that the shooting was in self-defense. He also told the jury that Dethlefsen had a reputation for violence in the community. Other evidence presented at the trial corroborated parts of Benn's story. Experts testified that the path of the bullet that struck Dethlefsen's chest and then entered the back of the couch was consistent with Dethlefsen being in the act of rising from the couch at the time he was first shot. Moreover, Deputy James Jones testified that Dethlefsen probably broke the glass face of the gun cabinet "as he fell ... after being wounded "or while he was "trying to get a weapon." The defense theory was that Benn shot Dethlefsen a second time because Dethlefsen was trying to get another gun. During the investigation, the police also found an empty beer can underneath Nelson's right knee. This was consistent with Benn's claim that Nelson threw a beer can at him while he was standing next to the living room table near where the bodies were found.

Roy Patrick, a "jail house informant" who shared a cell with Benn when Benn was awaiting trial, testified on behalf of the prosecution. According to Patrick's testimony, Benn confessed to him and asked Patrick to help him find someone "on the outside" who would be willing to take the blame for the murders. Patrick

testified that Benn drew diagrams of the murder scene and gave him details about the murder to relay to the person he found so that the person's statements would be believable.

The prosecution's theory was that the shootings were part of a common plan or scheme. Patrick's testimony provided critical support for that theory. Specifically, he testified that Benn told him about his involvement in a conspiracy with Dethlefsen and Nelson to perpetrate an insurance fraud. According to Patrick's testimony, Benn, Dethlefsen, and Nelson staged a "burglary" of Benn's trailer and collected the insurance. Then, a few months later, they burned down the trailer and collected insurance again. Both times, however, Benn refused to share the proceeds with Dethlefsen and Nelson. Nelson and Dethlefsen then threatened to disclose the crimes to the police, and Benn killed them to keep them from doing so.

Benn did in fact report a burglary of his trailer on October 12, 1987, but the only evidence of an insurance fraud with respect to that burglary (aside from Patrick's testimony) was the fact that Benn reported that ivory carvings were taken in the burglary and the police recovered some ivory figures from Dethlefsen's bedroom closet after he was killed. After the trial, however, a friend of the family stated that the half-brothers both owned ivory figures from Alaska.

Similarly, there was a fire at Benn's trailer on December 11, 1987, but there was little, if any, evidence, aside from Patrick's testimony, that the fire was intentionally started. There was testimony that Dethlefsen, an electrician, had worked on the furnace in Benn's trailer[1] and that some possessions that Benn normally kept in the trailer were not there on the day of the fire. Additionally, Benn did tell Monte that he was nervous about fire insurance fraud charges being filed against him because he claimed more than he should have after the fire, but he never told Monte that he had started the fire. The prosecution emphasized that Benn sent in a payment for his home insurance on the day of the fire. According to the insurance agent, however, the payment was not late and it was to cover January and February insurance. Benn had

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[1] The Ninth Circuit is mistaken on this point. The State attempted to elicit such testimony from Monte Benn, but the defense successfully objected to his speculative response.

already made payments to insure the trailer for December, the month of the fire.

The defense attempted to prevent the arson-insurance-fraud theory from being mentioned at trial by arguing in a motion in limine that there was no evidence of arson. In ruling that the information was admissible, the trial court said" This is probably the key decision in this case." The trial judge went on to state that:

> So far as the probative value is concerned, it goes to the very heart of the case. It is the kind of evidence that the State must and needs to prove if it's going to prove the aggravating factor that is involved in this case, and if it is going to prove premeditation. Without it, the State doesn't have a case for aggravated murder, or maybe doesn't have a case for premeditated murder. It is an essential ingredient.

In addition to testifying about Benn's burglary-arson-insurance-fraud motive, Patrick also testified that Benn wanted to kill Dethlefsen because Dethlefsen had removed Benn from his will and had given Benn's portion of his estate to a friend named William Hastings. Hastings testified that he was listed as a beneficiary in Dethlefsen's will, although there was nothing in the estate because Dethlefsen was so much in debt. Hastings did, however, get $40,000 from a separate life insurance policy. Patrick did not say anything about a life insurance policy.

Finally, Patrick testified that Benn told him that he had tried to hire someone named "Pete" to kill Dethlefsen for $500 but then changed his mind. Benn told Patrick that he wanted whoever took the rap for the murders to kill Pete. The prosecution emphasized this point in closing arguments noting that Benn tried to "reach out" and kill someone from prison.

The defense sought to impeach Patrick on cross-examination by establishing that Patrick was in jail with Benn because he had pled guilty to and was awaiting sentencing for second-degree arson. There was a 6 to 12 month sentencing range for this offense and the prosecution had originally asked for a 9 month sentence. Based on Patrick's cooperation, he received 6 months rather than nine. With good time credits for his work in prison, however, Patrick would have needed to serve only an additional 35 days even if he had received the 9 month sentence originally sought by

the prosecutors. Moreover, the prosecution downplayed the importance of the sentence reduction in closing arguments by stating "the reward that he got was that in a 6 to 12 month sentence, he got six months instead of nine months. Big reward."

The defense also sought to impeach Patrick by eliciting testimony that Patrick had been ordered to pay costs and restitution for his arson conviction and had failed to do so; that he had previous convictions for fraud by wire, burglary, and arson; that he had been paid for his testimony as an informant; that the State was paying for his food and hotel expenses while he was testifying; and that the subpoena used to bring Patrick to the State of Washington for Benn's trial protected him from arrest or criminal process while he was in town.

During the trial, a third party told the defense that the police had executed a warrant to search Patrick's hotel room based on a tip that Patrick was dealing drugs from the room. His room had been searched and crack pipes, a bong, rolling paper, a razor blade, and a copper brillo pad were recovered, but no arrests were made. The prosecution knew about this search and failed to disclose information about it to the defense. The defense did not learn the name of the confidential informant who had provided the information for the warrant until after the trial. At a later evidentiary hearing, the informant, Melvin Stevens, testified that Patrick was doing drugs while he was in Washington for Benn's trial. Stevens also said that Patrick told him that Benn did not commit the murder, but that Patrick knew enough to convict him and needed the money. [footnote omitted]

Walter "Pete" Hartman testified on behalf of the prosecution and said that Benn offered to pay him to kill Dethlefsen. Hartman said that he initially thought it was just talk and that he never took Benn up on his offer. [footnote omitted] Denver Carter, a former roommate of Benn's, testified for the prosecution as well and said that Benn admitted to him that he had shot Dethlefsen and Nelson. At one point, Carter said that Benn told him that a man named "Pete" owed him a favor and that Benn had a job for him, but that Benn never mentioned what the job was. Benn told Carter that, when Benn called Dethlefsen's house on the day of the murder, no one was supposed to answer the phone, but Benn never explained what that meant.

After deliberating for approximately seven and a half hours, the jury returned a verdict of guilty on both counts of premeditated murder. The jury also found that the murders were part of a common scheme or plan but did not find that they were the result of a single act of the defendant. The jury then recommended that Benn be sentenced to death, and he was.

B. EVIDENCE REVEALED AFTER TRIAL

Although on December 16, 1988, over two years before the trial began, the defense requested that the prosecution disclose all evidence in its possession that was favorable to the defendant, a great deal of impeachment evidence relating to Patrick, as well as important exculpatory evidence relating to the alleged arson-insurance-fraud allegation, was not turned over to the defense until after both the guilt and penalty phases of the trial had ended.

(1) Impeachment Evidence Related to Patrick

Even though the prosecuting attorneys had taken their first statements from Patrick over a year before the trial, Patrick's identity was not disclosed to the defense until the day before trial when he was added to the witness list. [footnote omitted] Pierce County Assistant Prosecuting Attorney Michael Johnson lied to the defense and stated that Patrick's identity could not be disclosed because he was in a witness protection program. It was later discovered that he was never in such a program.

The day that Benn's trial was scheduled to begin, the defense brought to the court's attention the fact that Brady material relating to Patrick had not been provided. The defense noted specifically that it did not have information about Patrick's prior contacts with the police, including whether Patrick had made statements in the past that had turned out to be incorrect. The trial court agreed and ordered the prosecution to turn over any written material relating to Patrick's contacts with law enforcement in the year prior to the murders. No such material was ever produced. The court also stated that "the prosecutor would have an obligation to tell [the defense] if there's prior situations where the informant had not been truthful." Prosecutor Johnson acknowledged this obligation and stated that they "had been notified of no such situations, your Honor." The prosecution never turned over any information that Patrick had engaged in improper conduct while acting as an informant. It was later discovered that the prosecution did not

attempt to obtain this information from any of the police detectives working on the case. Additionally, the defense later discovered that Detectives Ronald Lewis and Thomas Padukiewicz, both of whom supervised Patrick while he was assisting in law enforcement investigations, knew that Patrick had stolen both drugs and money during drug busts and that he had lied to the police about it. The defense was never told about this. Detective Padukiewicz had even gone so far as to write up a "deactivation memo" stating that Patrick could no longer work as an informant because he would not abide by department rules. The defense was never told about Patrick's deactivation.

The defense was also not informed that Patrick had broken into the evidence room of the California Bureau of Narcotics Enforcement while working as an informant and had stolen drugs that the police had previously seized. Nor was the defense told that, as a result of this offense, Patrick was charged with burglary and numerous counts of obstruction of justice and ultimately pled guilty to burglary.

The state did not inform defense counsel that Patrick had admitted to making false charges while in prison on a fraud conviction in the early 1980' s. Patrick had believed that he could get his time reduced if he reported the presence of firearms within the prison. He therefore had shotguns smuggled into the prison and then told the officials that he had found them. The prison officials discovered the scheme, and Patrick's prison sentence was extended.

The prosecution failed to disclose that Patrick was given $150 during Benn's trial as an advance payment for a videotape that Patrick claimed he had in his possession, showing a prostitute being murdered by Benn and several other men. Patrick said that the video was related to the "Green River case," a high profile serial murder investigation. Patrick never produced the tape, and the detectives working on the case said that they thought Patrick was lying about its existence, and that his story about Benn being involved in the" Green River" murders was "trash." The detectives also stated that they had spoken with the prosecutors in Benn's case about the tape and the money that was paid to Patrick. The prosecution, however, never told the defense about either the false tale of a "Green River" murder tape or the payment that Patrick had received.

When Patrick was in Washington for Benn's trial, he was stopped for a traffic offense and arrested because of some outstanding warrants. He called Prosecutor Johnson from jail, and Johnson ensured that he was released without being charged. The defense was never told about the arrest or Johnson's actions.

During the trial, the Fife County Police Department submitted police reports to the Pierce County prosecutor requesting that Patrick be charged with burglary. The prosecutor's office entered an "NCF" (no charges filed) the same day that closing arguments ended in the penalty phase of Benn's trial. This fact was never disclosed to the defense.

During Benn's trial, the prosecution arranged to postpone the filing of a warrant that was going to be issued because Patrick had violated probation. Patrick's probation officer had been told by the prosecutors not to do anything on the violation report or the order to issue a bench warrant. The warrant did not issue until two weeks after the verdict in Benn's case. The prosecution never told the defense that it had prevented the issuance of the warrant.

Testimony at the state habeas evidentiary hearing revealed that Patrick had acted as an informant in a murder case prior to Benn's trial, although at the trial he denied ever having done so previously. The defense was never told that Patrick had been an informant in a prior murder case and that in that case also he had claimed that the defendant had confessed to him while in jail.

At trial, Patrick denied that he used drugs while acting as an informant; however, testimony at a post-conviction evidentiary hearing revealed that he continuously used drugs during his time as an informant and that the police knew about it. This information was not disclosed to the defense.

(2) Exculpatory Evidence Related to the Arson-Insurance-Fraud Allegation

The prosecution turned over two reports describing the December 11, 1987 fire at Benn's trailer. The first was a February 12, 1988 report tentatively concluding that the fire was an accident. After this report was prepared, Deputy Fire Marshal Ted Thompson and Electrical Inspector Walter Erickson conducted a more thorough re-examination of the site. After the re-examination, Thompson and Erickson both conclusively determined that the fire in Benn's trailer was accidental. According

to Erickson, the Coleman furnace in Benn's trailer was the same make and model as the one that he owned, and this particular make and model had been recalled by the manufacturer due to a flaw that causes fires. Moreover, Fire Marshal Thompson concluded that the fire was accidental because:

> First, it is not uncommon for electrical heaters in older mobile homes to accidentally malfunction and cause fires. Second, there were no accelerants, such as gasoline in the trailer. Third, it is not uncommon for electrical heaters to malfunction in the winter .... Fourth, I opened up the front of the electrical heater and everything appeared to be in place; I observed nothing suspicious .... My fifth reason for determining the fire was accidental, not arson, was that I observed only one locale where the fire originated (the furnace), not multiple locales. Sixth, I saw no signs of forced entry, which are indicative of arson.

After the re-examination, a second and more detailed report was prepared on March 30, 1988. The second report, which was turned over to the defense, was misleading. Its only reference to the conclusions of Fire Marshal Thompson and Electrical Inspector Erickson was in a section stating that there was "no fault or failure" of the lead electrical wire and no evidence of tampering with the fuse panel. The March 30, 1988 report did not state that both the fire inspector and deputy marshal had concluded that the fire was accidental and could not have resulted from arson. Rather, it offered no definitive conclusion regarding the cause of the fire. It did not state that there had been a manufacturer's recall of this type of furnace and that it was the same type of furnace that Erickson had in his own home. To the contrary, it suggested that Coleman furnaces did not cause fires. Specifically, the March report stated that Al Pearson, the furnace technician, said that" he could find and think of no situation in which a furnace [such as a Coleman] had caused a fire in a mobile home." Finally, the report did not relate the six reasons Fire Marshal Thompson gave for concluding that the fire was accidental.

II. PROCEDURAL HISTORY

Benn appealed his convictions as well as his capital sentence. His direct appeals were denied by the Washington Supreme Court in

Washington v. Benn, 120 Wn.2d 631, 845 P.2d 289 (Wash. 1993), with three justices dissenting. Benn then initiated state habeas corpus proceedings and an evidentiary hearing was held. The Washington Supreme Court denied the state habeas petition. *In re Benn*, 134 Wn.2d 868, 952 P.2d 116 (Wash. 1998). It did not deny that the state improperly withheld evidence to which Benn was entitled, but it found that the state's actions were not prejudicial. *See id.* Two justices dissented, arguing that Benn should have received a new trial because of the state's failure to turn over exculpatory and impeachment material. *Id.*

Benn filed a federal habeas petition in the Western District of Washington alleging 22 errors, including his allegation that the prosecution withheld crucial exculpatory and impeachment evidence in violation of his due process rights. The district court agreed with Benn that material evidence had been withheld in violation of his constitutional rights, granted his petition for a writ of habeas corpus, and ordered a new trial without even considering the 21 other grounds of error asserted in his petition. *Benn v. Wood*, 2000 U.S. Dist. LEXIS 12741, No. C98-5131RDB, 2000 WL 1031361 (W.D. Wash. June 30, 2000).

Benn v. Lambert, 283 F.3d 1040, 1044-50 (9th Cir. 2002)(App. 6a- 18a).

In his statement, Lambert contends that Benn had no claim of self-defense since he did not testify. But, as discussed above, Benn's claim of self-defense came into evidence through his statements to his brother Monte, which were offered by the prosecutor. The physical evidence supported Benn's version to some extent. The trial court gave a self-defense jury instruction, and defense counsel argued that theory to the jury. On appeal, the State did not contend that it was error to give that instruction.

Reasons Why The Petition Should Be Denied

1. The petition fails to state any viable reason for this Court to exercise its discretion to grant review.

Rule 10 of the Rules of the Supreme Court lists three general considerations which "although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers" for granting review of circuit court decision: (a) conflicting court of appeals decisions on the same important matter (b) a court of appeals decision on an important federal question conflicts with a decision by a state court of last resort; (c) the court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; or (d) a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Petitioner Lambert has neither cited to Rule 10 nor argued that the Ninth Circuit's opinion in this matter falls within any of these criteria. Clearly it does not. Nor is there any consideration in this case of the same "character." Certainly, the correct interpretation of the standard of review set out in 28 U.S.C. § 2254(d) is an important federal question. But this Court decided that question in Williams v. Taylor, 529 U.S. 362 (2000).

And, as Lambert concedes, the Ninth Circuit applied the standard set out in Williams.

Lambert's only complaint with the Ninth Circuit's decision is that it did not correctly apply § 2254(d) to the facts of this case. He states: "In this case, while the Ninth Circuit cited to the correct standard of review, the circuit court did not apply the deference required by the statute." Petition at 2. Lambert fails to note that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10.

"We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U. S. 220, 227 (1925). This Court gives particular deference to the lower federal courts' factual analysis when they are both in agreement. *Graver Tank & Mfg. Co. v. Line Air Products Co.*, 336 U.S. 271, 275 (1949). Here, the district judge and a unanimous panel of the Ninth Circuit were in full agreement.

> We receive nearly 7,000 petitions for certiorari every Term, and can grant only a tiny fraction of them. A high degree of selectivity is thereby enjoined upon us in exercising our certiorari jurisdiction, and our Rule 10 embodies the standards by which we decide to grant review. One of the reasons contained in Rule 10.1(a) is the existence of a conflict between one court of appeals and another. The negative implication of this ground, borne out time and again in our decisions to grant and deny certiorari, is that ordinarily a court of appeals decision interpreting one of our precedents -- even one deemed to be arguably inconsistent with it -- will not be reviewed unless it conflicts with a decision of another

> court of appeals. This fact is a necessary concomitant of the limited capacity in this Court

Hubbard v. United States, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting). Here, Lambert does not even suggest that the Ninth Circuit's interpretation of this Court's decision in Williams was incorrect, much less that it conflicts with interpretations from other circuits.

In fact, the Ninth Circuit scrupulously followed this Court's ruling. It set out the standard of review as follows:

> Under AEDPA, a federal court may grant a writ of habeas corpus to a state prisoner only if the state court's decision is "contrary to, or involves an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or is "based on an unreasonable determination of the facts in light of the evidence presented" in the state courts. 28 U.S.C. § 2254(d). A state court decision is "contrary to" clearly established federal law if it "failed to apply the correct controlling authority from the Supreme Court." Shackleford v. Hubbard, 234 F.3d 1072, 1077 (9th Cir. 2000); see also, Williams v. Taylor, 529 U.S. 362, 405-07, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000); Packer v. Hill, 2002 U.S. App. LEXIS 607, No. 00-57051, 2002 WL 47063 (9th Cir. Jan. 15, 2002). [footnote omitted] A state court decision constitutes an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case." Williams, 529 U.S. at 407.

Benn v. Lambert, 283 F.3d at 1051-52; (App. 18a-19a). Lambert does not allege an error in this statement of the legal standards.

The Ninth Circuit acknowledged that the Washington Supreme Court "applied the rule in Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct.

1194 (1963), and its progeny." Benn v. Lambert, 283 F.3d at 1052; (App. 19a). "Therefore, the state court ruling is properly analyzed under the 'unreasonable application' clause of AEDPA." Id.; (App. 20a). The court then set out the legal standards under the Brady line of cases. Id. at 1052-53; (App. 20a-21a). Lambert does not allege any error regarding these standards. The Ninth Circuit then specifically found that the Washington Supreme Court's application of Brady was "unreasonable." Id. at 1054; (App. 22a). See also, id. at 1059. (App. 36a)

Lambert states the issue as follows: "Did the Ninth Circuit grant the deference required by § 2254(d)(1) when the court simply disagreed with the conclusions of the Washington State Supreme Court?" But the Ninth Circuit expressed far more than mere "disagreement."

> Given the importance of both Patrick's testimony and the arson-insurance-fraud theory to the prosecution's case, as well as the sheer volume and damaging nature of the improperly withheld evidence, we conclude that the Washington Supreme Court's determination that there was no Brady violation was clearly erroneous and constitutes an unreasonable application of Supreme Court precedent. *To say that we have a firm conviction that the state court erred in its application of Brady and its progeny would be a gross understatement indeed.*

Benn v. Lambert, 283 F.3d at 1062 (emphasis added); (App. 36a). See also, id. at 1058 n.11; (App. 30a) ("the prejudice resulting from the suppression of the impeachment evidence here was so great that it would satisfy any rational standard of materiality"). In a concurring opinion, Judge Trott went further:

> This case provides us with a textbook example of the abuse of executive power contemplated by Montesquieu, Lord Acton, and the Framers of our Constitution. Rather than adhere to the clear letter of the law, which itself is the ultimate check against arrogation of power, the prosecutor apparently deliberately withheld from the trial court and from the jury admissible evidence that would cause any fair-minded person to have grave reservations about the credibility of a key government witness.

Id. at 1063; (App. 37a-38a).

Thus, the Ninth Circuit clearly understood the deferential standard of review set out in § 2254(d) and Williams, and made a conscientious effort to apply it. This Court should not accept review merely to decide whether the Ninth Circuit's application was correct.

Lambert seems to suggest that there is some systemic problem with the Ninth Circuit's application of § 2254(d) that goes beyond this particular case. Cert. Petition at 10-12. Its only support for that position is that the Ninth Circuit has granted the writ of habeas corpus in one other capital case besides Benn since the passage of AEDPA. Lambert fails to explain how the decision in the other case was erroneous, or how it would provide any grounds for review of this case. Clearly, the Ninth Circuit does understand the difference between disagreeing with a state court and finding that court's analysis to be unreasonable. In Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000), the Ninth Circuit adopted the following procedure in habeas cases: first, the court determines whether the state court decision was erroneous; if so, it goes on to determine whether the decision

was contrary to or an unreasonable application of clearly established federal law. Id. at 1154-55. In Van Tran, the court denied relief even though it found one of petitioner's claims to be meritorious. "Were we reviewing this case de novo, we would hold that the state court's decision was erroneous. . . . Nevertheless, after reviewing the record and the relevant cases, we conclude that the state court's decision did not involve an unreasonable application of clearly established federal law." Id. at 1159. In Benn, the court noted that it was following the procedure set out in Van Tran. Benn v. Lambert, 283 F.3d at 1052. (App. 20a)

Similarly, in Bailey v. Newland, 263 F.3d 1022 (9th Cir. 2001), cert. denied -- U.S. -- , 122 S. Ct. 1556; 152 L. Ed. 2d 479 (2002), the court acknowledged that it might agree with petitioner on the merits "if we were presented with this issue on direct appeal." Id. at 1033. Nevertheless, it found that the state court's contrary conclusion was not an "unreasonable application of clearly established Federal law." Id. In LaCrosse v. Kernan, 244 F.3d 702 (9th Cir. 2001), petitioner claimed his Sixth Amendment rights were violated when testimony was read back to the jury outside of his presence. Although the Ninth Circuit had consistently found that practice to violate the Sixth Amendment, it denied relief because the California courts could reasonably interpret Supreme Court precedent differently. Id. at 707-08.

Thus, the Ninth Circuit as a whole clearly understands and applies the correct standard of review in habeas cases. There is no systemic problem that would justify review by this Court.

2. The Ninth Circuit properly found that the Washington State Supreme Court's application of Brady v. Maryland and its progeny was "unreasonable."

Even if this Court were inclined to review a lower court's misapplication of a correct legal standard, it should not grant review here. The Ninth Circuit's unanimous decision was correct.

Lambert does not claim that the Ninth Circuit disregarded any factual determinations of the Washington Supreme Court. There is no dispute regarding the exculpatory and impeaching evidence withheld by the prosecutors. In fact, "[i]n oral argument, counsel for the respondent readily conceded egregious wrongdoing, but argued nevertheless that on this record, the wrongdoing did not prejudice the petitioner." Benn v. Lambert, 283 F.3d 1040, 1064 (Trott, J., concurring); (App. 39a).

The Ninth Circuit properly found that the Washington State Supreme Court had unreasonably applied this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

> The prosecution failed to disclose multiple pieces of critical impeachment information that could have been used to undermine the credibility of Patrick, a prosecution witness whose testimony was crucial to the state's claims of premeditation and common

> scheme or plan, as well as to the state's theory regarding Benn's principal motive for killing the two individuals. Because Patrick is a witness whose "'reliability ... may well be determinative of guilt or innocence,' nondisclosure of evidence affecting [his] credibility falls within [the Brady] rule." *Giglio, 405 U.S. at 154* (quoting *Napue v. Illinois, 360 U.S. 264, 269, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959)).*

Benn v. Lambert, 283 F.3d at 1054; (App, 22a-23a).

The Court addressed the State's claim that the undisclosed impeachment evidence was merely cumulative of that produced at trial.

> The undisclosed impeachment evidence in this case was substantial and was far more damaging to Patrick's credibility than the impeachment evidence available to the defense at trial. If anything, the police-sanitized version of Patrick's fifteen years of work as an informant increased his credibility in the eyes of the jurors. The jury was told only that the police routinely relied on Patrick for help with drug investigations. Information demonstrating that Patrick had regularly lied to the authorities while acting as an informant, was untrustworthy and deceptive, and was even willing to fabricate crimes in order to gain a benefit for himself would have severely undermined his credibility.

Id. at 1055; (App. 24a).

> There is one specific lie of Patrick's that, standing alone, would be sufficient to constitute a Brady violation. The prosecution failed to disclose that Patrick approached the police a week before trial claiming that he had a videotape showing that Benn was involved in a killing that was part of a notorious unsolved murder case (the Green River murders) unrelated to the Dethlefsen-Nelson killings. The prosecution also failed to disclose that Patrick was given $ 150 to produce the tape, that he never did so, and that the detectives concluded that he was lying about the tape's existence and about Benn's involvement in the other murders. This evidence could have been used to show that Patrick was willing to lie about Benn and even to accuse him falsely of murder, if doing so would result in even a minimal benefit to him. . . . Patrick, when confronted with his lies at the state habeas evidentiary hearing, confessed that "I

> would lie -- I would always lie about me. I would always do that. I was a liar." The jury, however, never heard that Patrick had lied about anything. The evidence regarding Patrick's tale of the videotape was "direct proof" of his lack of credibility, and the failure to disclose his fabrication was prejudicial

Id. at 1056-57; (App. 26a-27a). The Ninth Circuit concluded:

> Analyzed collectively, the withheld impeachment evidence reveals that Patrick, a critical witness for the state was 'completely unreliable, a liar for hire, [and] ready to perjure himself for whatever advantage he could squeeze out of the system.'

Id. at 1059; (App. 31a)(quoting Benn v. Wood, 2000 WL at *5 (W.D. Wash. 2000)).

Lambert contends that "[t]he Ninth Circuit failed to provide any deference to the Washington Supreme Court's determination of what evidence is critical in proving aggravated murder under Washington law." Cert. Petition at 8. In fact, it was the Washington Supreme Court that failed to consider all the elements. The state was required to prove that Benn intentionally killed the victims, and the absence of self-defense, to convict him of murder in the second degree. RCW 9A.32.010. The additional element of premeditation raised the offenses to murder in the first degree. RCW 9A.32.020(1) and .030(1)(a). Next, the state had to prove as an aggravating factor that the murders were part of a "common scheme or plan" RCW 10.95.020. This finding triggered a special sentencing proceeding at which the jury decided whether to impose death or life without parole. RCW 10.95.050. At sentencing, the jury considered all of the evidence presented at the

guilt phase, additional evidence relating to sentencing, and the defendant's allocution. RCW 10.95.060. It then answered a single question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" RCW 10.95.060(4). Only a unanimous answer of "yes" could result in the death penalty. RCW 10.95.080(1). If even one juror answered "no," the result would be a life sentence. RCW 10.95.080(2).

The majority of the Washington Supreme Court, however, looked only to whether the withheld evidence would have affected the jury's finding regarding self-defense. The majority contended that the State's case could be proved without Patrick's testimony, noting that eyewitnesses and physical evidence placed Benn at the scene. In Re Benn, 134 Wn. 2nd 868, 907, 952 P. 2nd 116 (1998); (App. 311a). It failed to acknowledge that the killer's identity was not in dispute at trial. The majority then discussed at length the defendant's statement to his brother Monte Benn. Id; (App. 311a-313a). According to Monte, Gary related the following:

> [M]oments before the shooting the defendant had found a piece of paper on Jack Dethlefsen's kitchen counter with Gail Fisk's phone number on it. When the defendant showed the paper to Jack Dethlefsen, Jack responded "you got me."

Id. at 907; (App. 312a). Gary also told Monte that "he literally had to grab a gun out of Jack's hand." Id. The majority believed this testimony was somehow

equivalent to Patrick's. Id. at 915; (App. 328a) ("Impeaching Mr. Patrick's claim that the defendant confessed to him would have been of little value in light of Monte Benn's testimony that the defendant also confessed to him"). But Monte's statement was relied on *by the defense* to support Benn's claim of self-defense and lack of premeditation. Monte Benn's testimony did not corroborate Patrick's claim that Benn coldly plotted to kill Dethlefsen and Nelson.

The majority overlooked that Patrick was the *only* witness to claim that:

- Benn and the victims plotted an insurance fraud together, that Benn failed to pay the victims their share, and that Benn decided to kill them when they threatened to go to the police;
- Benn wanted to kill Dethlefsen because he was mad about being left out of Dethlefsen's will;
- Benn plotted another murder while in the jail.[2]

The Ninth Circuit, unlike the Washington Supreme Court, considered the effect of the withheld evidence on all of the disputed facts.

> Patrick's testimony was critical because it directly contradicted Benn's evidence that he acted in self-defense and that he did not

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[2] The majority also seemed to forget what importance it had previously placed on Roy Patrick's testimony in rejecting Benn's claims in its opinion affirming Benn's conviction and death sentence in Benn's direct appeal. In that decision, the Court discussed Patrick's testimony at length in the initial "facts" section. State v. Benn, 120 Wn.2d 63, 640-41, 845 P.2nd 289(1993); (App. 82a-83a). The Court then rejected Benn's argument that the "insurance fraud" evidence was improperly admitted under ER 404(b), noting that it was central to the State's theory of motive and was supported by Patrick's trial testimony, which the Court quoted extensively. Id. at 653-55; (App. 108a-110a).

> premeditate the killings. Moreover, it provided the only direct evidence of the aggravating factor of common scheme or plan. Patrick was the only witness to testify to the state's primary theory that Benn killed Dethlefsen and Nelson for threatening to reveal an arson-insurance-fraud scheme. He was also the only witness to suggest that Benn wanted to kill Dethlefsen because Dethlefsen changed his will so as to remove Benn as a beneficiary. Without those theories (and it is difficult to believe that the jury would have accepted the will theory), the only motive the prosecution suggested was that Benn was upset because he thought that Dethlefsen was harassing his ex-girlfriend -- a motive that supported the defense's theory (that Benn became upset when he saw a note with his ex-girlfriend's phone number on it in Dethlefsen's house and a spontaneous argument ensued) as much as the prosecution's.
>
> Moreover, Patrick's testimony that Benn attempted to hire someone to kill Hartman while in prison undercut Benn's defense, because the jury was more likely to believe that Benn was guilty of premeditating the murders of Dethlefsen and Nelson after being told that he plotted to kill Hartman from prison.

Id. at 1059; (App. 30a-31a). Patrick's uncorroborated claim that Benn tried to arrange a killing while in custody was also devastating at the penalty phase, since it provided the *only* evidence to support the prosecutor's argument that, even if Benn received a life sentence, he would present a future danger to the community. The prosecutor argued to the jury as follows: "Mr. Patrick testified in the guilt phase; the defendant wanted . . . to reach out of the jail to kill another person." Not surprisingly, the state does not attempt to defend the Washington Supreme Court's decision as to the penalty phase.

The Ninth Circuit found that the withheld evidence concerning the arson investigation compounded the prejudice. It recognized that the Washington

Supreme Court found this evidence to be unimportant because the State presented other motives for the killings. But it found the Washington Court's analysis to be unreasonable because it ignored the state's burden of proving that the murders were premeditated and part of a common scheme or plan.

> The experts' conclusion that the fire was accidental, and the reasons therefor, was material evidence that could have served to rebut the arson-insurance-fraud theory that the prosecution offered to prove motive, premeditation, and the aggravating circumstance of common scheme or plan. We reject the Washington Supreme Court's conclusion that the cause of the fire was not critical to the prosecution's insurance fraud theory because, as the state trial court stated, the arson-insurance-fraud theory evidence was "the kind of evidence that the State must and needs to prove if it's going to prove the aggravating factor that is involved in this case. ... Without it, the State doesn't have a case for aggravated murder. ..." The district court reiterated this point when it stated that evidence of the accidental nature of the fire, if presented to the jury, would have "gravely undercut[]the fear of police exposure" that the prosecution asserted led Benn to kill Dethlefsen and Nelson. The prosecutor also stressed the importance of the arson-fraud-insurance theory to the jury. In his closing argument, he stated: "And aggravating circumstances exist ... the common scheme or plan, the single act .... He indeed wanted both men dead. He told the persons he confided in about the fact that Mike was threatening over the fire insurance money as well as Jack."

Benn v. Lambert, 283 F.3d at 1060; (App. 32a-33a) (citation and footnote omitted).

> Evidence that the fire in Benn's trailer was not caused by arson and had been determined by fire officials to be accidental would have substantially undermined the state's principal theory of motive and its main support for the aggravating factor of common scheme or plan, as well as its contention that the killings were premeditated. Thus, we hold that the state's failure to disclose exculpatory evidence about the nature of the fire constitutes a Brady violation,

> independent of the Brady violation that resulted from the state's suppression of impeachment evidence. We also hold that the state court ruling regarding the exculpatory evidence was clearly erroneous and thus constituted an "unreasonable application" of clearly established Supreme Court precedent.

Id. at 1062; (App. 38a).

These statements by the court demonstrate that the Ninth Circuit was correct when it concluded that the arson-insurance-fraud evidence was important to the state's case. The conclusion was based on the statements of the trial court and prosecutor, and on the elements the state needed to prove to obtain a conviction for aggravated first-degree murder and a death sentence.

Thus, the Ninth Circuit not only correctly stated the standard of review under 28 U.S.C. § 2254(d), it correctly applied the standard in this case.

CONCLUSION

The decision below presents no consideration that fits within the criteria set forth in Rule 10. Although Lambert contends that the Ninth Circuit erred, he does not suggest that this error would affect anything other than this particular case. The Ninth Circuit decision sets no controversial precedent, but merely requires the Pierce County prosecutors to retry a single case.

That would hardly cause injustice. All thirteen state and federal judges to review this case found that the prosecutors committed misconduct. See In Re

Benn, 134 Wn.2d at 902-903; (App. 302a-303a)(majority)[3] and at 944-945; (App. 387a-388a)(dissent); Benn v. Wood, 2000 U.S. Dist. LEXIS 1274 (W.D. Wash.2000) (App. 40a-56a); Benn v. Lambert, 283 F.3d 1044 (9th Cir. 2002) (App. 36a).

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 2nd day of July 2002.

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[3] The majority found that the prosecutors violated Washington's rules of criminal procedure, but considered the violation insufficiently prejudicial to merit relief.

IN THE SUPREME COURT
OF THE UNITED STATES

JOHN LAMBERT, Petitioner, vs. GARY BENN, Respondent.	No. 01-1755 CERTIFICATE OF SERVICE

I, Christina Alburas, being first duly sworn, hereby certify that on July 2, 2002, I served copies of Respondent's Response to the Petition for Certiorari and Motion for Leave to Proceed In Forma Pauperis by United States Mail on the following persons:

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